STATE OF IOWA
PROPERTY ASSESSMENT APPEAL BOARD

Robert & Louise Krogh, Appellant, **v.** **Cerro Gordo County Board of Review,** Appellee.	**ORDER** **Docket No. 13-17-0225** **Parcel No. 06-18-402-001-00**
Jennifer & Vincent Tomlinson, Appellant, **v.** **Cerro Gordo County Board of Review,** Appellee.	**ORDER** **Docket No. 13-17-0226** **Parcel No. 05-24-330-031-00**
Kristopher Alcorn, Appellant, **v.** **Cerro Gordo County Board of Review,** Appellee.	**ORDER** **Docket No. 13-17-0343** **Parcel No. 06-18-402-006-00**

On June 16, 2014, the above-captioned appeals came on for a consolidated hearing before the Iowa Property Assessment Appeal Board. The appeal was conducted under Iowa Code section 441.37A(2)(a-b) (2013) and Iowa Administrative Code rules 701-71.21(1) et al. Appellant Robert Krogh represented the interests of all appellants and submitted evidence supporting their appeals. Assistant County Attorney Steve Tynan represented the Board of Review at hearing. The Appeal Board now, having reviewed the entire record, heard the testimony, and being fully advised, finds:

Findings of Fact

Robert and Louise Krogh and Kristopher Alcorn are the owners of commercially classified properties located at 2200 6th Avenue, Clear Lake, Iowa. The January 1, 2013, assessment for the Krogh property (Unit 1) was $69,440, allocated as $31,830 in land value and $37,610 in building improvement value. The January 1, 2013, assessment for the Alcorn property (Unit 6) was $56,480, allocated as $23,880 in land value and $32,600 in building improvement value. Jennifer and Vincent Tomlinson are the owners of commercially classified property located at 2110 South Lakeview Drive, Clear Lake, Iowa. The January 1, 2013, assessment for the Tomlinson property was $77,630, allocated as $30,990 in land value and $46,640 in building improvement value.

The Krogh and Alcorn properties are condominium storage units built in 2007. They are located in an industrial area of Clear Lake. The Kroghs' unit is 1536 square feet and situated on 0.113 acres of land. Alcorn's unit is 1152 square feet and situated on 0.084 acres. The units are part of a 7-unit, 8448-square-foot, metal warehouse and each is accessed by an individual overhead door. The Tomlinson property is a stand-alone, 3360-square-foot, metal pole-frame garage with an overhead door and standard entry door access. It is located across and down the street from the Tomlinsons' lakeshore dwelling. All the properties were classified as commercial property in 2011, as residential in 2012, and changed back to commercial in 2013.

The Appellants appealed their property assessments to the Cerro Gordo County Board of Review on the ground that the properties were misclassified under Iowa Code sections 441.37(1)(a)(3). The Board of Review denied the protests. The Appellants then appealed to this Board reasserting their claims.

Robert Krogh testified he resides in a condominium dwelling on Clear Lake and because land values are high on the lake, it is prohibitive to buy lake property for storage. For this reason, his condominium storage unit is roughly 3 miles away from his lake residence. The Kroghs use the unit

for personal storage of household goods, tools, an automobile, etc. He generates no income from the unit nor does he use it for any business or commercial purpose. Krogh testified that although the storage unit can be leased, the declarations prohibit operating a business in the property and its use is restricted to storage. (Appellant's Exhibit E). The covenants for these units provide that an owner or lessee may keep personal, business, or professional records or accounts in the unit. (Appellants' Exhibit E). Krogh testified there are other storage units located in the area that are rented out as a business venture and Krogh previously rented a storage unit prior to purchasing this condominium. Krogh testified Alcorn's unit is also located several miles from his residence for the same reason as his, it is in the same storage unit condominiums, and is also used exclusively for personal storage.

Jennifer Tomlinson testified their storage unit is located on a privately owned lot, which is within walking distance from their lakefront residence. She reports the location is a mixed-use area of residential and commercial properties. There is a gas station/bait shop two doors down. The Tomlinsons' unit is used only for storage of personal property, and does not have water or sewer. Tomlinson understands other counties throughout the State classify similar storage units based on their actual use. She believes since her unit is used only for personal storage, it should be classified residential.

Krogh offered a 2011 email from Cary Halfpop, Chief Appraiser, Property Tax Division of the Iowa Department of Revenue (IDR). (Appellant's Exhibit A). Halfpop's letter stated that "if the primary use is for personal storage . . . it most closely resembles residential use." He notes his understanding that this particular unit is not used for a commercial venture and that he would probably classify it as residential property. However, Halfpop also stated that he will not be classifying the Appellants' property and his email is "not a formal opinion of the Department of Revenue."

Krogh also submitted another email from Halfpop written in 2012 with a memorandum Halfpop authored which was sent from the IDR to all assessors in the State on the storage

condominium classification issue. (Appellant's Exhibit B). The memorandum stated the residential classification rules include a requirement that property must be used for human habitation. The rules permit residential classification of storage sheds, detached garages, etc. if used in conjunction with or part of a dwelling for human habitation. Halfpop then states, "Generally speaking, this contemplates such structures or improvements to qualify as residential if they are part of the same or adjoining parcel as the dwelling, not a storage structure built across town and totally unconnected to the owner's dwelling."

In addition, Krogh submitted a 2013 email from Assistant Iowa State Ombudsman Jason Pulliam. Pulliam states, in his opinion, the property does not meet the definition of commercial real estate. However, he further indicates the property also does not appear to meet the definition of residential real estate. (Appellants' Exhibit C).

After the Board of Review denied the protests, it wrote a letter to the IDR Director voicing its disagreement with the IDR directive and its reluctance to deny the Krogh, Alcorn, and Tomlinson protests. (Appellants' Exhibit D).

County Assessor John Boedeker testified on behalf of the Board of Review. Boedeker reported the IDR Director has authority over assessors and they are required to follow IDR directives. He believes the fact that a property cannot be used for human habitation is central in its classification. Therefore, the prior rule followed in Clear Lake was based, in part, on whether humans could live in the property. If roughly 1/4 or more of a storage building was an apartment, living quarters, or studio; he would consider it livable and classify it residential. In addition to attached garages and detached garages on the same or an adjacent parcel as the dwelling, those built directly across the street from a residence were classified residential. He explained his office cannot determine classification based on the contents of the garage as suggested by Appellants, since it is impossible for the Assessor's office to

know whether the contents are personal or business property. Zoning was not a consideration in his classification decision.

Julie Roisen, Property Tax Administrator at IDR, testified she is authorized to speak on behalf of the Department. Roisen reported assessors and Boards of Review are required to follow IDR interpretations and directives. According to Roisen, IDR has the authority to interpret the law and rules related to property assessment. While IDR issues directives and instructions to assessors and boards of review about classification, it cannot classify a particular property. She explained the 2011 opinion offered by Halfpop had not been subject to Department oversight or reviewed by their legal counsel. Roisen indicated Halfpop's 2012 memorandum was an authorized IDR interpretation that reversed his 2011 opinion letter. (Appellee's Exhibit C). As a follow-up to the memorandum, IDR conducted a survey in 2013 to determine the classification of storage condominiums in the State. Of the fourteen jurisdictions that responded, the overwhelming majority of the properties were classified commercial. (Appellee's Exhibit L).

After reviewing the facts related to the three subject properties, Roisen concluded none are habitable standing alone and none are used in conjunction with a dwelling on the same or a contiguous parcel. In Roisen's opinion, past legal precedent directs assessors to look beyond use as the sole criteria for classification and consider how the marketplace would view a particular property. Applying that concept to the subject properties, Roisen believes the storage garages would be sold alone and none would be sold with the owners' dwellings. Roisen opined the market would view the three subject garages as commercial property.

Conclusion of Law

The Appeal Board applied the following law.

The Appeal Board has jurisdiction of this matter under Iowa Code sections 421.1A and 441.37A. This Board is an agency and the provisions of the Administrative Procedure Act apply.

Iowa Code § 17A.2(1). This appeal is a contested case. § 441.37A(1)(b). The Appeal Board determines anew all questions arising before the Board of Review, but considers only those grounds presented to or considered by the Board of Review. §§ 441.37A(3)(a); 441.37A(1)(b). New or additional evidence may be introduced. *Id*. The Appeal Board considers the record as a whole and all of the evidence regardless of who introduced it. § 441.37A(3)(a); *see also Hy-vee, Inc. v. Employment Appeal Bd.*, 710 N.W.2d 1, 3 (Iowa 2005). There is no presumption the assessed value is correct. § 441.37A(3)(a). However, the taxpayer has the burden of proof. § 441.21(3).

The Director of the IDR has the duty to supervise assessors and boards of review. The Director has the authority to prescribe rules for the purpose of bringing about uniformity and equalization of assessments, which are to be adhered to and followed by all assessing jurisdictions. *Id*. The IDR has promulgated rules for the classification and valuation of real estate. *See* Iowa Admin. Code Ch. 701-71.1. Classifications are based on the best judgment of the assessor exercised following the guidelines set out in the rule. *Id*. Boards of Review, as well as assessors, are required to adhere to the rule when they classify property and exercise assessment functions. r. 701-71.1(2). Classification is based on the property's present use and not its highest and best use. r. 701-71.1(1). There can be only one classification per property. *Id*.

Iowa Administrative rule 701-71.1(4), related to the classification of residential real estate, states:

> Residential real estate shall include all lands and buildings which are primarily used or intended for human habitation . . . . Buildings used primarily or intended for human habitation shall include the dwelling as well as structures and improvements used primarily as a part of, or in conjunction with, the dwelling. This includes but is not limited to garages, whether attached or detached . . . and storage sheds for household goods.

Conversely, commercial real estate

> shall include all lands and improvements and structures located thereon which are primarily used or intended as a place of business where goods, wares, services, or merchandise is stored or offered for sale at wholesale or retail. . . An apartment in a

> horizontal property regime (condominium) referred to in Iowa Code chapter 499B which is used or intended for use as a commercial venture, other than leased for human habitation, shall be classified as commercial real estate. . . .

Iowa Admin. r. 701-71.1(5).

The Director is also authorized to offer guidance, memoranda, or instructions deemed necessary to those supervised officers. Iowa Code § 421.17. Additionally, IDR's tax policy section is responsible for interpretation of legislation, statutes, and cases, and for developing and maintaining rules related to tax issues. r. 701-6.01(2)(b)(3). It was this exercise of duty that led to the IDR publishing the classification memorandum to assessors across the State in 2012. (Exhibit B).

IDR's directive appears to be its interpretation of the residential classification rule. Generally an agency's interpretation of its own rules is given weight unless that interpretation is plainly inconsistent with the rules. *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 475 (Iowa 1983) (citing *Bowles v. Seminole Rock Co*., 325 U.S. 410, 413-14 (1945)). If the interpretation is inconsistent with the rules and the rules are valid, then we give no deference to the interpretation but give the rule itself the force and effect of law. *Id*. (citing *Davenport Cmty. Sch. Dist. v. Iowa Civil Rights Comm'n*, 277 N.W.2d 907, 909 (Iowa 1979).

The Appellants do not contend that these storage condominiums are used for human habitation. Therefore, to qualify for residential classification, the Appellants must be able to show the storage condominiums are used in conjunction with their dwellings. The IDR directive states that in order to qualify as a structure or improvement used in conjunction with a dwelling, the structure or improvement must be on the same or adjacent parcel. The Appellants argue the phrase "in conjunction with" in r. 71.1(4) does not include a requirement that the storage unit be located within a certain distance from the dwelling and suggest the IDR's interpretation is thereby inconsistent with the rule. Because the rule does not include a prohibition against considering location, we cannot say the IDR

interpretation is plainly inconsistent with the rule and therefore give the IDR interpretation appropriate weight.

The Appellants assert these storage condominiums are used in conjunction with their dwelling in a similar manner as a garage. Unlike an appurtenant garage, however, these storage condominiums are freely alienable parcels that can be sold separately from the residential dwellings. Further, in the case of the Kroghs and Alcorn, the storage condominiums are located several miles away from their residential dwellings. In our view, these facts weigh against concluding that these properties, particularly those owned by the Kroghs' and Alcorn, are used in conjunction with their residential dwellings.

The Appellants also argue the rules require classification of their property based on its actual use and the actual use of their property is for storage of residential items and therefore they should be classified residential. We, however, characterize the issue differently. The use of these units is for storage. The contents the Appellants store in these units happen to be items generally considered personal household items. However, these condominiums, like other storage units, could be used to store business-related items. Here, the covenants for these units provide than an owner may keep personal, business, or professional records or accounts in the unit. Boedeker testified it would be difficult to determine whether items held in a storage unit are personal or business property. Given the difficulty in ascertaining the nature of objects held in storage condominium units, we do not believe the contents of the storage condominium can dictate its classification.

Lastly, the Appellants contend their condominiums are not used for commercial purposes and therefore should not be commercially classified. Conversely, IDR argues case law indicates that assessors may look at how the marketplace would view a property when determining its classification and the marketplace would view these condominiums as commercial.

In *Sperfslage v. Ames City Bd. Of Review*, 480 N.W.2d 47, 49 (Iowa 1992), the Iowa Supreme Court examined a distinction in the rules that classified property with three or more units as commercial realty. The *Sperfslage* Court upheld the administrative rule classifying rental properties with three or more separate living quarters as commercial even though one-unit and two-unit rental properties were classified residential. *Id*. The taxpayers claimed that one-unit and two-unit properties, like properties with three or more separate units, could be used as income-producing properties. *Id*. However, in defending the rule, the Department submitted evidence showing that one-unit and two-unit rental properties fell into the same market as owner-occupied properties because "it was far more likely that an owner occupier would purchase one-unit or two-unit rental properties than [a] three-unit property for use as a residence." *Id*.

The classification of three properties purchased as on-going bed and breakfasts (B&Bs) or with the intent to convert them to B&Bs was the issue in *Huntley v. Board of Review of Dubuque*, No. 02-1884, 2004 WL 357079, at *2 (Iowa Ct. App. February 27, 2004). In that case, the court followed the *Sperfslage* reasoning in concluding the classification was not based on the commercial or residential use of the property, but on market classifications. *Id*. Even though the B&Bs were large, they possessed the potential to be sold as single-family dwellings and should be classified residential. *Id*.

Similarly, in the *Timberland* case the court also upheld the commercial classification of apartment buildings while condominiums used for human habitation were classified residential. *Timberland Partners v. Iowa Dept. of Revenue*, 757 N.W.2d 172, 176-177 (Iowa 2008). The court emphasized the ultimate question for classification is the use of the property. *Id*. at 176. The court found the primary use of the two types of dwellings were dissimilar, where typically condominiums are residential and apartments are exclusively commercial. *Id*. at 176-77. The court noted that each condominium unit is a separate real estate parcel and "could be marketed as a single-family unit." *Id*. at 176 (citing Iowa Code § 499B.10). IDR relies on the *Timberland* reasoning to distinguish the types

of garages typically attached or used in conjunction with residential property to the type of storage units the Appellants own.

We hesitate to rely on *Sperfslage* or *Timberland* as they were equal protection challenges to administrative rules and thus involve a different legal analysis than the application of the rule to a specific set of facts at issue here. Although *Huntley* involved the application of the rule, the court appears to have been significantly guided by the *Sperfslage* reasoning. *Huntley*, 2004 WL 357079 at *2. Further, the marketplace considerations discussed as rationale in each case risks giving undue weight to the property's highest and best use. Currently rule 701-71.1(1) does not permit assessors to consider a property's highest and best use when setting its classification, but the rule in place at the *Sperfslage* and *Huntley* were decided did not include such a prohibition. While marketplace considerations would likely be pertinent to establishing the rational basis for a rule within the auspices of an equal protection analysis, in the past this Board has questioned the consideration of potential future uses of property in setting the classification of a specific parcel.

In *City of Newton v. Bd. of Review of Jasper Cnty*, the Iowa Supreme Court attempted to define the term "commercial" for purposes of determining the proper classification of a 63-unit, residential cooperative the assessor classified as commercial realty. 532 N.W.2d 771 (1995), *overruled on other grounds by Krupp Place 1 Co-op, Inc. v. Bd. of Review of Jasper Cnty.*, 801 N.W.2d 9 (2011). The Court stated that "in order to be considered commercial, an endeavor must involve activity which a person would normally engage in for profit." *Id*. at 773 (citing *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1008-09 (5th Cir. 1985) & *Kaiser v. Western R/C Flyers, Inc*., 477 N.W.2d 557, 561 (1991)). The Court noted that "the rental of multiunit dwellings is generally regarded as an income or profit-oriented enterprise" and upheld the commercial classification. *Id*. (citing *Sperfslage*, 480 N.W.2d at 49).

Krogh notes the restrictive covenants applicable to his and Alcon's condominiums preclude the operation of any commercial enterprise out of the condominium storage unit. However, the covenants expressly permit a condominium owner to lease or rent his unit for storage, which would be generally considered consistent with a commercial use. Likewise, there is no indication the Tomlinsons are precluded from renting their condominium unit for profit. Krogh testified there are other storage units located in the area that are rented out as a business venture and he previously rented a storage unit before buying his storage condominium. Even though the Appellants do not operate their units as a for-profit business venture, storage units are normally operated and generally regarded as profit-motivated enterprises, which is consistent with a commercial classification.

Based on the foregoing, we find the Appellants failed to prove the subject properties should be classified residential and determine the commercial classification should be retained. However, we note that as a commercially classified property these parcels may qualify for the business property tax credit and suggest the Appellants contact the Assessor to determine if they are eligible.

The APPEAL BOARD ORDERS the 2013 assessments of the properties owned by Kroghs, Alcorn, and Tomlinsons located in Clear Lake, Iowa, as set by the Cerro Gordo County Board of Review are affirmed.

Dated this 13th day of August, 2014.

Jacqueline Rypma

Jacqueline Rypma, Presiding Officer

Stewart Iverson

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